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BRIEF ON MERITS

No. 741

In the Supreme Court of the United States

OCTOBER TERM 1952

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON and W. R. MCENTIRE,

Petitioners,

MELVA SEAMONS and ROY HILL, d.b.a. SEAMONS TRUCK LINE, and JOSEPH J. MILNE TRUCK LINE, INC., a corporation,

Petitioners,

v.

WYCOFF COMPANY, INCORPORATED, a corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals (R. 83-86) is reported at 195 F.2d 252 (C.C.A. 10); the supplemental opinion of the Court of Appeals (R. 114-117) is reported at 195 F.2d 255 (C.C.A. 10).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 19, 1951; the order denying petition for rehearing was entered on March 19, 1952; an order

was entered staying the mandate for thirty (30) days from March 31, 1952. The petition for a writ of certiorari was filed April 29, 1952, and was granted June 9, 1952 (R. 118). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Whether the transportation of motion picture films from film distributing offices in Salt Lake City, Utah, to points and places (theaters) within Utah and return, and between points and places (theaters) wholly within Utah, is transportation in interstate commerce and subject to the exclusive regulation of the Interstate Commerce Commission, or is transportation in intrastate commerce and subject to the exclusive regulation of the Public Service Commission of Utah.

2. Whether a single district judge had jurisdiction to hear and determine this case between a private corporation plaintiff and the Public Service Commission of Utah, an administrative agency of the State of Utah, defendant, in view of Section 2281 of Title 28 of the United States Code.

Statute Involved

Section 2281 of Title 28 of the United States Code provided as of the dates involved in this case:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard

and determined by a district court of three judges under section 2284 of this title."

Applicable Utah statutes are set forth in Appendix.

Statement

The complaint filed on October 10, 1950, in the District Court (R. 1) alleged, among other things, that respondent trucking corporation transported motion picture films under operating authorities granted by the Interstate Commerce Commission between Salt Lake City film distribution exchanges and points in Utah, Idaho and Montana, and that as to film transportation between points and places wholly within Utah the petitioner Public Service Commission of Utah was threatening to prevent such film transportation. The complaint sought a declaratory judgment that such Utah transportation was in interstate commerce, and further that the Public Service Commission of Utah be restrained from interfering with transportation over Utah routes authorized by the Interstate Commerce Commission (R. 1-3). The answer (R. 3) of the defendant Commission, among other things, admitted that it would attempt to stop such Utah film transportation insofar as such transportation was in *intra*state commerce. The District Court held that the transportation of motion picture film between points and places wholly within Utah was in intrastate commerce, and subject to regulation by the Public Service Commission of Utah, and that such Commission was not interfering with interstate commerce nor imposing any burden thereon, and denied the prayer of the complaint (R. 16-22). The Circuit Court of Appeals reversed this decision (R. 87), upon the ground that transportation of film wholly within Utah was in interstate commerce (R. 83-87), and denied petition for rehearing (R 117).

National motion picture film distributing companies maintain branch distributing offices in Salt Lake City, Utah, for film distribution to theaters in Utah as well as other intermountain states (R. 26). The film is sent to such branch offices from laboratories in New York, California and New Jersey (R. 49, 52).

The raw film (R. 27, 39, 40) is shipped to the branch exchange at Salt Lake City, Utah, in cardboard cartons, each of which contains a number of 1,000 foot lengths (R. 27, 40, 77), this number being dependent upon the number of final assembled prints desired by the Salt Lake City exchanges. After arrival of this raw film in Utah, it is inspected, assembled into 2,000 foot rolls, additional strips of film known as "heads and tails" are placed on each of such rolls to facilitate use in theater projection machines, and the film is then wound on metal reels (R. 27, 40, 41, 77). These reels are then placed in metal containers and stored in vaults at the exchange to await subsequent booking and distribution to theaters (R. 41). The term "booking" designates the procedure whereby the actual date for film showing is established between the exchange and the motion picture theater (R. 27, 42). A substantial number of reeled and processed films are held in the storage vaults either for time lapses between bookings or because there is at that time no booking for that particular picture (R. 57). It seems clear that the purpose of the Salt Lake City film exchange processing and storage is to meet the business purposes of the distributors, and as such has no relation to the transportation of the film, and is not a necessary incident of such transportation. The film cannot be shipped to theater exhibitors in Utah in the condition in which it is received at the exchange as it is not suitable for showing, and must be processed before projection (R. 40).

The film showing at the theaters is made under a specie of licensing exhibit contract, under film company copyright, between the distributor and the theater exhibitor (Ex. 1, R. 82A, 69, Ex. 3, R. 82C, 70), and while the contracts of the various film distributing companies are somewhat similar in nature, there is some variance as to the manner in which the contract is executed both as to the time of completed execution with reference to the presence of the film in Utah, and as to the type of film, as a feature, short, or newsreel.

Exhibition contracts in all instances are executed in Utah by the exhibitor and forwarded for final approval to the distributor's New York office. However, dates of delivery of films to theaters in Utah are not a part of the contract at time of approval, and distributor is not bound to make delivery at any certain theater on any certain date (R. 54, 55).

As to feature films, Universal International Film Exchange and Republic Pictures Corporation on new films or reissues execute the contract prior to the time of the film arrival in Utah as to 60% of the films, the contracts on remaining films being actually executed after film arrival in Utah (R. 41), but the contract at this point merely details the number of days of play, and does not specify either the date on which the film will be shown or the particular print which will be transported (R. 42, 55, 65). After the film has arrived in Utah and has been assembled and processed as above; booking arrangements are made and the date of showing at the particular theater and transportation is for the first time established (R. 42, 65). Moreover, these procedures are established on new films coming into Utah for the first time. Contracts on subsequent runs cover films in the storage vaults. On the

other hand, 20th Century Fox and RKO Pictures, Inc., do not execute the contracts and sell the pictures until after the film has been received in Utah, processed, and a trade screening has been held for the benfit of local exhibitors (R. 58, 71). The screening is an established practice whereunder films are shown to prospective theater exhibitor buyers. After they have had the opportunity to view the film, they then select those films desired for exhibit (R. 58, 71). In either event, it will be noted that the date on which the film is to be transported to the theater and the particular theater is not established until after films are processed and physically present in Utah (R. 77).

Short subjects are handled with a slight difference, in that they are purchased in blocks or groups for exhibition over a period of time as high as one year or more (R. 71), and in some instances may not have been produced at the time the contract of exhibition is initially executed (R. 71). Again, however, the booking of the specific date of showing is not agreed upon until after it has been processed and is actually present in Utah (R. 49, 77). Newsreel distribution is likened to a newspaper subscription (R. 29), and unlike the other films, in many instances may be shipped directly from the film laboratories outside of Utah directly to the theater (R. 77). In such case, newsreels are clearly transported in interstate commerce.

It will be noted that the contracts of exhibition themselves provide the manner (booking procedures) in which play dates of the films shall be established. Thus, in Section 7 of the Twentieth-Century Fox Film corporation contract (E. 3, R. 82 D, R. 70) it is provided that the film distributor shall mail to the exhibitor a written notice specifying the first date upon which such picture will become available for exhibition, at least fifteen days prior

to the specified date. Within fourteen days after such notice is mailed, the exhibitor selects an exhibition date within the period commencing upon the available date and ending thirty days thereafter, and notifies the distributor of his selection. If such date is acceptable to the distributor, it is confirmed in writing, or if not acceptable, the exhibitor is notified in writing of this fact, and the exhibitor and distributor attempt to agree on a mutually acceptable date, failing which the distributor sets the date. The Republic Pictures contract contains in substance the same selection of play date provisions in paragraph 5 (Ex. 1, R. 82B, R. 69).

After film arrival at the branch distributing office in Salt Lake City, it ultimately is transported to the theaters for exhibition, which movement may consist either of transport from the exchange to the theater and later direct return, or the film may be circuited between two or more theaters before such return occurs (R. 30). Wherever possible, however, the film, after showing in a theater, is returned to the exchange for inspection and checking before it is again routed to the next theater (R. 45, 66). Since the film exchanges serve several intermountain states from Salt Lake City, there will be instances of film transport from Salt Lake City or Utah points to a theater in other states and return. Such movement are clearly interstate in nature, beyond the issues of this case.

The transportation contracts or arrangements with local carriers for film transport within Utah are entered into and paid for by the Utah theater-exhibitors, who select the mode of carrier, usually either by trucking company, express or parcel post (R. 37, 43, 53, 66, 77). The distributor does require that the selected carrier have proper authority and adequate insurance, which is merely another way of saying that carriers must be approved regulated

carriers (R. 67). The contract of transportation within Utah is entirely separate and distinct, between different parties and covering entirely different lading than that under which the films originally reach Utah.

Finally, after the film has completed its useful life at the Salt Lake City exchange, it is removed from the reels, placed in metal barrels, and shipped to the laboratories for junking (R. 32, 58).

The testimony supporting all of the foregoing facts was adduced from witnesses called to the stand by the respondent itself in the District Court trial.

At the time the original complaint was filed on October 10, 1950, the Public Service Commission of Utah consisted of Hal S. Bennett, Donald Hacking, and W. R. McEntire. On August 27, 1951, by order of the Circuit Court of Appeals, (R. 83) Stewart M. Hanson was substituted in the place of Donald Hacking. W. R. McEntire died on June 3, 1952, and the same Donald Hacking was reappointed to the Commission by the Governor of Utah on June 12, 1952. So far as this case is concerned, the policy and attitude of the Public Service Commission of Utah has remained constant during all of this period and to the present time.

Specifications of Errors

1. The Circuit Court of Appeals erred in holding that the transportation of motion picture films from film distributing offices in Salt Lake City, Utah, to points and places (theaters) within Utah and return, and between points and places (theaters) wholly within Utah, is transportation in interstate commerce and subject to the exclusive regulation of the Interstate Commerce Commission.

2. While the Circuit Court of Appeals did not err in failing to require the convening of a three-judge court pursuant to Section 2281 of Title 28 of the United States Code, it did err in failing to dismiss the case in view of Utah statutes permitting judicial review of the orders and decisions of the Public Service Commission of Utah. (Consideration of error pursuant to order allowing certiorari, R. 118).

Summary of Argument

While a determination of whether the film transportation in this case, wholly between Utah points, is in interstate or intrastate commerce is essentially a factual consideration, in considering relevant authority it is necessary to distinguish between those cases which are concerned with the essential nature of the business involved, and those which involve the transportation incident to the business requirements. One class of cases defines interstate commerce from the standpoint of such federal regulatory acts as the Sherman Act, the Packers and Stockyard Act, or the various labor laws. Another class of cases defines interstate commerce for the purposes of rate making, local taxation, and regulation of transportation itself. The first class is in reality concerned with the essential nature of the business involved, while the latter class is concerned with transportation as such, and it is this class which controls the definition herein required. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 12 F.2d 541, 547 (C. C. A. 4); *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 271; *General Oil Co., v. Crain*, 209 U. S. 211.

The Circuit Court of Appeals has not only overlooked pertinent facts of the case, but has confused this issue, as evidenced by citation of such cases as *Republic Pictures*

Corporation v. Kappler, 151 F. 2d 543 (C. C. A. 8), a case arising under the Fair Labor Standards Act, in support of the conclusions of the decision.

In determining whether a shipment moves in interstate or intrastate commerce, it is the essential nature of the transportation which controls. There are, however, a number of typical facts of marked assistance in reaching the proper conclusion, such as the intent of the parties, the manner and form of the transportation and other contracts involved, stoppage and the purpose of the same, alteration of the form of commodity, and destruction of the original package. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257; *General Oil Company v. Crain*, 209 U. S. 211; *Southern Pacific v. Arizona*, 249 U. S. 472; *Chicago, Milwaukee & St. Paul R. R. v. Iowa*, 233 U. S. 334; *Nashville C. & St. L. R. Co. v. Wallace*, 288 U. S. 249.

In this case, raw film is shipped to the Salt Lake City exchange offices of the film distributors in cardboard cartons usually containing 1000 foot lengths. There it is inspected, additional film strips known as heads and tails are added, it is usually reassembled in 2000 foot lengths, wound on metal reels, and placed in storage vaults. It cannot be exhibited in the form in which it is received.

As to feature films, some distributors enter into contracts of exhibition prior to film arrival in Utah, which are a specie of licensing agreement wherein the theatre agrees to show the film. Other major distributors do not execute any contract of exhibition until after the film has arrived in Utah, and been screened by Utah theater owners. In all instances, however, it is not until after the film has arrived in Utah and been processed that the particular

date on which it will be shown and the particular print which will be used, is established by booking negotiations between the distributor and theater owner. As to shorts and serials, the procedures are essentially the same, except that the initial purchase may be in groups of pictures, some of which may not have been produced prior to contract. Newsreels are acquired in a manner similar to a newspaper subscription on a weekly or semi-weekly basis, and the film in some instances may go directly to the theater from out of state points. Newsreels alone, in such instances, would move in interstate commerce.

The film is utimately shipped from the distribution offices to the Utah theaters, or between Utah theaters by a carrier selected, contracted with, and paid by the theater owner. The film moves on an entirely different lading and carrier than the shipment initially into Utah, involving different consignor and consignee, and in a distinctly different package and form. Ultimately the film serves its purposes at the Utah exchange, and is, after a lapse of months or years, placed in metal barrels and returned to out of state laboratories.

There are two distinct transportation movements of film: the first from out-of-state points to the exchange at Salt Lake City, and the second a series of purely intrastate movements within Utah. Between these movements there is a substantial break, ranging from days to months or years. The purpose of this intervening period has nothing whatsoever to do with the requirements or necessities of transportation itself, but is solely designed to serve the business requirements of film distribution. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257; *General Oil Co. v. Crain*, 209 U. S. 211; *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665.

Film transportation is in substance very similar to the transportation involved in a typical commodity distribution system. While it is true that the parties ultimately intend that the film will be used in theaters throughout Utah, there is no intent of a continuing movement which would blend the two transportation movements into one, which must be accomplished if the Utah transportation is to be deemed an interstate movement. This is particularly apparent where, in addition to the break set forth above, the original consignee distributor has nothing to do with selection, payment, and contract with the carrier who handles the Utah shipment, except to require that any carrier handling films be properly insured, and authorized by proper authority to transport the same. *Southern Pacific Co. v. Arizona,* 249 U. S. 472. The fact that film title remains in the distributor is immaterial to any issue in this case, as the licensee theater owner has possession and control of the film during the period in which transportation within Utah occurs, and commerce cannot be alternately described as interstate or intrastate simply because of the individual holding technical title.

In addition to a consideration on the merits, a jurisdictional question is presented.

This Court in the order allowing certiorari requested a discussion of whether a single judge had jurisdiction to hear and determine this case in view of section 2281 of Title 28 of the United States Code, which would require a three-judge court in the event the requested injunction was based upon the unconstitutionality of a state statute. No direct attack or reference is made in the pleadings to the unconstitutionality of a state statute. It is believed that this case is not one wherein the petition seeks an injunction on the ground of the unconstitutionality of a statute as applied, but rather upon the allegedly erroneous admini-

strative action under a state statute which itself is admittedly constitutional. In such case, a single judge may hear the petition. *Ex parte Bransford,* 310 U. S. 354, 358, 361; *Phillips v. United States,* 312 U. S. 246, 249.

As an ancillary consideration, however, it is apparent that the respondent had available and unused, adequate Utah procedure for review of any Commission order to preserve for ultimate review in this Court any federal questions arising out of such Commission order. As it is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states, the District Judge should have refused to take cognizance of this case. *Alabama Pub. Ser. Com. v. Southern R. Co.,* 341 U. S. 341, 347, 348, 350.

Argument

I

The issue in this case involves a determination of the nature of film transportation wholly within Utah, between the film distribution exchanges in Salt Lake City and theaters throughout Utah, and is not concerned with the essential nature of the business of distributing motion picture film from such exchanges to points in Utah and other intermountain states, which issue has been confused in the decision of the Circuit Court of Appeals.

The facts of film transportation in this case are relatively simple. Film is transported from New York, New Jersey or California to distribution exchanges at Salt Lake City, Utah, where the film is processed, and stored in vaults to await actual distribution. From this point the film is again transported either to other states in the intermountain territory or to theaters in Utah for exhibi-

tion. It may likewise be transported between theaters in Utah. From the exchange, interstate film shipments may be shipped to points in intermountain states other than Utah, but the concern here lies only with the transportation entirely in Utah, for it is this transporation that the Public Service Commission asserts is intrastate in nature, and, therefore, subject to regulation and control under appropriate Utah Law and authority.

In the concluding summary, the opinion of the Circuit Court of Appeals states (R. 86):

> "We conclude the parties to these contracts contemplated and obligated themselves to a continuous transportation of the film from the distributor to the various exhibitors and back to the exchange, interrupted only temporarily at the exchange for processing of the film and for allocation to the various exhibitors, and the entire transportation constituted interstate commerce."

Apart from the fact that such summary ignores undisputed facts in evidence such as the trade screening at Salt Lake City, Utah, in many instances, prior to contract of exhibition, booking arrangements after the film has arrived in Utah, the fact that the Utah transportation is between different consignors and consignees under entirely distinct shipping contracts, or the distinct change in the character of the local shipments of film as compared with the original package of raw film received at the exchange, it confuses the issue herein by failing to distinguish between the essential nature of the film distribution business and the essential nature of the transportation incident thereto.

There is a class of cases decided by this court, wherein the concern lies with the essential nature of a business, and

whether such business is in interstate commerce and thus within the purview of certain federal regulatory acts such as the Sherman Act, the Packers and Stockyard Act, or the various labor acts. On the other hand, there is another class of cases, which are applicable to the instant case, and which are concerned with a definition of interstate commerce for purposes of rate making, local taxation, and regulation of transportation itself. The distinction between a definition of the essential nature of a business and the essential nature of the transportation incident thereto has been repeatedly recognized.

Thus in *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 12 F. (2d) 541, 547. (C. C. A. 4), the oil company shipped gasoline and oils from other states to its storage facilities at Wilmington, North Carolina. The oil company knew and intended that the gasoline and oil so shipped would later be distributed, and in fact, they were later distributed to customers in North Carolina. In holding that the latter shipments by way of distribution within North Carolina were in intrastate commerce, and subject to intrastate freight rates approved by the North Carolina Corporation Commission, the court stated, page 547:

> "Nor do we think that the cases of *Binderup v. Pathe Exchange*, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308, *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A.L.R. 229, and *Swift & Co. v. United States*, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518, relied upon by defendants, are in point. These cases arose under the Sherman Act (Comp. St. Sec. 8820 et seq.) and the Packers and Stockyards Act of 1921 (Comp. St. Ann. Supp. 1923, Secs. 8716¼-8716¼z), and have nothing to do with the rates charged by carriers. That there is a difference in the principles applied to the two classes of cases is apparent at a glance. In the

one case it is the essential nature of the business which governs; in the other it is the essential nature of the particular transportation involved. If a group of merchants buying and selling goods in interstate commerce should conspire to raise prices, they would unquestionably be amenable to prosecution under the Sherman Act; but this would not authorize a transportation company to charge interstate rates on a shipment of goods which one of the merchants might make to another within the same state. As said by Judge Sibley in *A. C. L. R. R. v. R. R. Commission of Georgia,* (D. C.) 281 F. 321:

> 'While in the business of buying and selling goods, interstate commerce may reach all the way from first purchase to final delivery, interstate transportation for the purposes of determining the rate to be charged may have narrower limits.' Compare *Loewe v. Lawlor,* 208 U. S. at page 301, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, with *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.,* 249 U. S. at page 151, 39 S. Ct. 237, 63 L. Ed. 517."

This case was later approved in *Atlantic Coast Line R. Co. v. Standard Oil Co.,* 275 U. S. 257, 271, a case concerned with the status of transportation of imported fuel oil and gasoline by way of distribution from Port Tampa, Florida, to consumers wholly within Florida, in compliance with contracts made with consumers prior to shipment of oil and gasoline from foreign ports. At page 271 of the decision, this Court said:

> "We concur in the reasoning and conclusions of the United States Circuit Court of Appeals for the fourth circuit, in Atlantic Coast Line R. Co. v. Standard Oil Co., 12 F. (2d) 541."

The District Court below recognized the decisions of this Court as set forth in the two Standard Oil Cases, when it stated (R. 82):

> "I think the motion picture production business is interstate in character. I think the motion picture distribution business is interstate in character. But we are not concerned with that."

The logic of both Standard Oil cases is clear. The jurisdiction of the Public Service Commission of Utah is strictly confined to film transporation from the standpoint of proper control of the manner of transport operation and appropriate operating authority. It is not concerned with the application of labor or trust law, wherein the problem of definition is closely akin to the nature of the business on a broad and overall basis. We believe it apparent that the Circuit Court of Appeals has failed to make a distinction between the business itself and the transportation incident thereto, as it has cited (R. 86) as authority for its determination such cases as *Republic Pictures Corporation v. Kappler*, 151 F. (2d) 543, (C. C. A. 8), Aff. P. C. 327 U. S. 757, re. den. 327 U. S. 817.

Republic Pictures Corporation v. Kappler, supra, concerned an action brought by an employee to recover for overtime pay under the provisions of the Fair Labor Standards Act, upon the theory that the business in which his employer was engaged was in interstate commerce. Kappler was employed at a film distribution office in Des Moines as a booker, arranged showing dates, and also contacted the transportation companies and other agencies to whom the films might be delivered for transportation, either to points in Iowa or neighboring states. The court held that he was engaged in interstate commerce within the broad wording of the Fair Labor Standards Act,

and in so doing set forth a definition of the term "in commerce" as found in Section 3 of the Act, at page 544 of the opinion:

> "Commerce means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof.
> * * *
>
> "An employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state."

As the court pointed out, page 545, the employee's contact with and participation in interstate commerce were substantial, and since his services were essential to the movement of commerce he was engaged in commerce within the meaning of the act. Inherent in the definition of the court were the duties of the employee in the general business in which he was engaged. Moreover, in the Kappler case, supra, the court cited as authority page 545, *Binderup v. Pathe Exchange*, 263 U. S. 291, which type of case was specifically distinguished in the Standard Oil case quotation set forth above.

Cases under the Fair Labor Standards Act are not analogous to the issues of film transport here involved, nor are those under the Sherman Act, for under such legislation the definition of commerce rests on the broad nature of the business, and may embrace for the purposes of such federal acts incidents of transportation which are in and of themselves intrastate for such other purposes as rate making or transportation control.

II

Whether transportation is intrastate or interstate is determined by its essential nature. The essential nature of the transportation of film wholly within Utah is intrastate in character for the reason that the original interstate package shipment of raw film upon arrival at the Utah exchange in Salt Lake City is broken, altered, processed, repackaged in several metal containers, stored and there held for the business purposes of film distribution; that thereafter independent local transportation contracts are executed between entirely different consignees and consignors; that the distributor is not bound as to the delivery of film until after the film is available or has come to rest in the storage vaults of the distributor in the Salt Lake City exchange ready for distribution in Utah; that no local transportation contract can be executed as between a Utah theater exhibitor and a local Utah carrier until the film is available in the Utah exchange, processed, stored and properly booked.

This Court has repeatedly held that the definition of a transportation movement must be determined by its essential nature. At the same time, however, there are a number of typical factors which are of marked assistance in making this determination, such as the intent of the parties, the manner and form of the transportation and other contracts involved, stoppage, alteration of the form of commodity, and destruction of the original package. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257; *General Oil Company v. Crain*, 209 U. S. 211; *Southern Pacific v. Arizona*, 249 U. S. 472; *Chicago, Milwaukee & St. Paul R. R. v. Iowa*, 233 U. S. 334; *Nashville C. & St. L. R. Co. v. Wallace*, 288 U. S. 249; *B. & O. v. Settle*, 260 U. S. 166.

There is in this case a distinct break in the transportation movement which occurs after the film reaches the Salt Lake City exchange offices from the out-of-state

film laboratories. This pause or break, which may range from a few days to many months, is not occasioned by any requirements of transportation, but is solely to serve the business purposes of the film exchanges. Raw film reaches Utah in cardboard cartons containing 1000 foot lengths, the number of lengths being dependent upon the number of final assembled prints desired for the territory. After arrival it is inspected, additional film strips known as heads and tails are added, and the film is wound on metal reels, usually in 2000 foot lengths, placed in metal cans, and stored in vaults. The film cannot be exhibited by the theaters in the form in which it is initially received at the exchanges. The form of the commodity has, therefore, been substantially changed, and there is thereafter an additional necessary lapse of time before that film can be ultimately transported to a Utah theater. This additional lapse of time clearly serves the business needs of the film distributors. While in some instances prior to the time of arrival of the film in Utah, the Utah theatre has contracted to exhibit the film, nevertheless, the exact date on which such exhibition shall occur and the particular film which will be used are not determined until after the film is actually present at the exchange in Utah. The distributors are not bound by contract or otherwise, to deliver the film to any exhibitor until after it is available in Utah, and then only after a determination is made between distributor and theater exhibitors as to play date. Such arrangements are made in what is in one sense termed "booking," the purpose of which is to arrange suitable exhibition or play dates as between the various theaters served by the exchange. Since there are relatively few films available as contrasted to the number of theaters, such arrangement permits date allocation of the films. This procedure is true as to all types of films with the exception of some newsreels. Again, the delay between film arrival and

ultimate shipment has nothing whatsoever to do with any transportation problem. Moreover, as to many of the major film distributors on feature films, there is no agreement by the theater owner to exhibit any film until after that film has reached Utah, been processed, and a trade screening has occurred at which the theater owner has a chance to actually see the film. As to these films, the purpose of delay is to offer the commodity for license to the theater owners.

This film handling and delay occurs when the film reaches Utah for the first time. In many instances, after the first showing, the film returns to the exchange for projection and damage inspection, and storage to await execution of further contracts of exhibition and further booking, and may remain in such storage for an appreciable period of time. This case is not only concerned with the initial Utah transport, but with all subsequent movements as well, so long as they are within state boundaries.

This court has consistently held that delay of this type serves the business interests of the shipper and not transportation requirements. Thus, in *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U.S. 257, the Oil Company maintained Florida storage tanks and warehouses for receiving and storing oil products produced and shipped to Florida from other states and countries. From Florida facilities the products were reshipped to local bulk stations in Florida, which, in turn, shipped to consumers in tank wagons. Occasionally service stations were directly supplied from the main storage facilities. About 95% of the fuel oil was sold on contracts executed before the oil had been shipped to the Florida storage tanks, and at the time the shipment was made from point of origin the final destination of any particular cargo could not be

determined. There was no through freight rate, and no joint arrangement of any kind as between transportation to storage and from there to consumers. In holding that the Florida movements were intrastate in nature, and that intrastate freight rates should apply, this court stated, page 269:

> "The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which in intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville, or the St. Johns river terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."
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> • • •

"We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate."

In *General Oil Co. v. Crain*, 209 U.S. 211, 230; the Oil Company sought an injunction against collection of a tax for inspection of oils in Tennessee, which it had brought into that state and stored in tanks. The tanks were either marked as containing oil already sold in the respective states of Arkansas, Louisiana, and Missippi, as oil to be distributed in Tennessee, or as containing oil to be sold in those same states, but for which there were no orders at the time the shipment from the manufacturing plants had been received This Court held that the tax was not a burden on interstate commerce, and that the oil was stored for the convenience of distribution and reshipping in tank cars and barrels for purposes outside its mere transportation. At page 230:

"The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, Detnold, Prosecutor v. Engle, supra, but for the business purposes and profit of the company. * * *"

The foregoing decisions contain an underlying concept that when a delay between transportation movements is one which serves the business needs of the shipper and is not a necessary pause for transportation requirements, such pause is not an incident of transportation and usually means that one movement has terminated and the shipment has come to rest. An entirely separate and distinct movement begins when such goods are again trans-

ported to the ultimate consumer. This is precisely what occurred with respect to the film shipments in this case. The mere fact that there exists an intention that such second transportation will occur, does not blend the two movements, and thus convert the second intrastate movement into one in interstate commerce.

Film transportation in this case presents such a situation. The films move into Utah in interstate commerce, and as is the case in a typical warehouse distribution system, they then come to rest at the exchanges to serve the purely business purposes of the distributors. There is no through freight rate, no in-transit privilege, and no joint arrangement of any kind between transportation to Salt Lake City exchanges and subsequent transportation locally to Utah theaters. When the film is transported to the theaters at a later date it is an entirely separate film movement and when that movement is between Utah points, it is in intrastate commerce.

In *Susquehanna Coal Co. v. South Amboy,* 228 U.S. 665, 669, Pennsylvania coal was shipped to a New Jersey tide water port, where if no bottoms were available for further transportation it was transferred into a storage yard, it being intended to keep a certain amount of coal on hand to fill anticipated orders. This court held that the interstate movement ceased when the coal reached such storage yard, and it was, therefore, subject to state taxation. In this case, the coal was intended to be ultimately transported to the consumer, yet such intention did not alter the basic nature of the transportation movements and the termination of shipment at the storage yard.

Again, in *Independent Warehouses, Inc. v. Scheele,* 331 U.S. 70, coal from Pennsylvania mines was shipped to a New Jersey yard which was to be later shipped out

to various destinations. The coal was held in the yard under transit privileges which contemplate that coal could be shipped from the mine to the yard, there stored, and later shipped to destination on a through tariff rate. In holding that the interstate shipment ceased when the coal reached the storage yard, thus permitting imposition of a local license tax, the court stated, page 83:

> "The facts bring the case exactly within this description, although the record shows that most of the coal after storage goes to other states and little, if any, is distributed locally at Coalberg. Not what ultimately happens to the goods or where they finally go, but the occasion and purpose of the interruption are controlling. 'The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied.' Minnesota v. Blasius, 290 U.S. at 10, 78 L. Ed. 136, 54 S.Ct. 34."

In *B. & O. S.W.R.R. Co. v. Settle,* 260 U.S. 166, Mr. Justice Brandeis emphasized, page 173:

> "The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. Shipments to and from distributing points often present this situation, if the applicable tariffs do not confer reconsignment or transit privileges."

See also:

American Steel & Wire Co. v. Speed, 192 U.S. 500; *Southern Pacific Co. v. Arizona*, 249 U.S. 472; *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465; *Arkadelphia Milling Co. v. St. Louis, S.W.R.R. Co.*, 249 U.S. 134; *Bacon v. Illinois*, 227 U.S. 504; *Chicago M. & St. P. R. Co. v. Iowa*, 233 U.S. 334; *Brown v. Houston*, 114 U.S. 622; *Pittsburg Southern Coal Co. v. Bates*, 156 U.S. 577.

In addition to the manner in which film is processed and handled at the Salt Lake City exchanges before it is transported for exhibition at Utah theatres, there is another factor which unquestionably indicates the intrastate nature of the transportation in Utah. The film is transported to Utah under contracts of shipment between the distribution companies and the carrier. It seems clear that this transportation has nothing whatsoever to do with the Utah theater exhibitors. When the time comes for Utah shipment, however, the contracts or arrangements for this transportation are made by the theater owner, who is free to select not only the type of carrier as between rail, truck, or parcel post, but the particular carrier itself. It is true that the exhibitor retains the broad right of approval, which is essentially based upon selection of a carrier by the theater owner which has proper operating authority and insurance, but this does not alter the fact that it is the theater exhibitor who contracts with the carrier, pays the costs of transportation, and to whom the bill of lading is issued. There are two entirely distinct contracts of transportation, involving entirely different parties and independent rates and payment. While it is undoubtedly true that the manner of billing will not alone determine the nature of commerce, it is likewise true that it is a factor to be considered in determining the nature

of the transportation. When these facts are coupled with the complete break in transportation which occurs at the exchanges, it becomes even more apparent that we are here concerned with two separate movements, one into Utah and the other within Utah.

Respondent has attempted to present a theory of a continuining flow of transportation movement from the out-of-state film laboratories into the Utah exchanges, and ultimately back to the laboratories. In support of such contention it is urged that title to the films remains in the distributing companies and that they merely license exhibition, and that when the exhibition has been finally accomplished the old film is returned to out-of-state laboratories for junking. The actual ownership of the film has no relation to any question of transportation involved in this case. The theater exhibitor acquires the right to use this film for showing in his theater for a period of time, and pursuant to such right the film is delivered to his possession. As a necessary incident to such use and possession he transports or causes to be transported such film. The fact of legal title has no relation whatsoever to the nature of the shipping movement under such facts, nor can commerce be alternately classified as inter or intrastate merely because the title may rest in one person or another. Mere formalities do not control, and the question is one of substance.

So far as the film junking is concerned, this occurs after the film has been in use at the exchange for a considerable period of time extending into months and even years. During this period much of the film may lie dormant awaiting contracts for exhibition and booking. Whatever the reason for its Utah storage, the fact remains that this period of delay has nothing whatsoever to do with

transportation or shipping requirements. The ultimate movement from Utah back to the film laboratories, with the film stripped from the reels and placed in metal barrels, is distinct from shipment while the film is in active use and exhibition, and unlike the Utah transportation is arranged and paid for by the film distributor rather than the theater exhibitor.

There is a considerable variance in time lapse in film shipment, between Utah arrival and Utah shipment. In some instances, the second shipment may occur in relatively short time involving a matter of days, or it may in other instances be much longer. That such time lapse is of no consequence in determining the nature of the commerce has been pointed out by this court, *B. & O. v. Settle*, 260 U.S. 166, 173.

It must be clear then that the Circuit Court of Appeals has not only misinterpreted, but misapplied as well, important decisions of this Court and of the courts of other Circuits. If allowed to stand, the decision herein will drastically alter presently accepted concepts of interstate and intrastate commerce in relation to transportation, upon a nationwide scale, not to mention the confusion which will result therefrom. It will also unsettle commonly accepted distribution-transportation practices and principles established and followed for many years by both the transportation and shipping industries. It will without doubt make worthless the intrastate operating rights and certificates of hundreds of local intrastate carriers, as well as divest them of a major portion of their present traffic. It is difficult to conceive of a single industry upon a national scale that does not intend that the commodities handled and shipped by it to various state distributors shall eventually be transported to dealers, exhibitors or

businesses at final destination throughout each state, which traffic is now being transported by hundreds of local intrastate carriers holding intrastate certificates from the various state commissions.

The Petitioners herein earnestly feel they are not only representing their own interests in urging that the Judgment of the Circuit Court of Appeals be reversed, but that they are also representing important principles effecting the businesses and fortunes of many hundreds of firms and peoples.

III

A single district judge had jurisdiction to hear and determine this case between a private corporation plaintiff and the Public Service Commission of Utah, an administrative agency of the State of Utah, defendant, so far as Section 2281 of Title 28 of the United State Code is concerned. The district judge, however, should have dismissed the case in view of the availability in state court of judicial review of orders of the Public Service Commission of Utah, adequately preserving any federal question arising under commission order.

The order allowing Certiorari requested counsel to discuss on briefs and oral argument the question whether a single judge had jurisdiction to hear and determine this case in view of section 2281 of Title 28 of the United States Code. For the convenience of the court we repeat at this point that section:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an adminis-

trative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

In connection with an analysis of this question pertinent provisions of the pleadings are relevant. Paragraphs 6, 7, and 8, and the prayer of the complaint (R. 23) read as follows:

"(6) That the defendant Commission and the defendant members thereof threaten to and are attempting to stop and prevent plaintiff from transporting motion picture film and newsreels between points and places within the State of Utah, and they are thereby interfering with the conduct of interstate commerce by the plaintiff and imposing an undue burden upon interstate commerce.

"(7) That unless the defendants are enjoined, they will block, harass and prevent plaintiff in the transportation of said motion picture film and newsreels in Utah, to the detriment of plaintiff and the shipping public, and plaintiff has no other speedy or adequate remedy and will suffer *irrepairable* injury unless defendants are enjoined from their threatened action.

"(8) That this case arises under the Constitution and laws of the United States in that Section 8 of Article I of said Constitution grants to the Congress of the United States the power to regulate commerce among the several states, and the Congress has delegated to the Interstate Commerce Commission power and authority to ascertain the nature of interstate

commerce and the exclusive authority to regulate the same.

Wherefore, plaintiff demands judgment against the defendants, and each and all of them, as follows:

(1) That the Court make and enter a declaratory judgment adjudicating that the transportation of motion picture film and newsreels is interstate commerce.

(2) That the defendants, and each and all of them, be forever enjoined and restrained from interfering with the transportation of motion picture film and newsreels in Utah by plaintiff over the routes as authorized by the Interstate Commerce Commission under docket No. MC89684 and all subs and amendments thereto."

The answer of the Public Service Commission of Utah, directed to these paragraphs, reads as follows (R. 4):

"Defendants admit the allegations of paragraphs six (6), seven (7), and eight (8), except the parts alleging or inferring that defendants are interfering or attempting to interfere with the conduct of transportation in interstate commerce by the plaintiff, or that defendants are imposing or attempting to impose a burden upon such interstate commerce, or that defendants are blocking or preventing plaintiff from the conduct of transportation of motion picture film in interstate commerce, which parts are specifically denied."

The pleadings themselves do not contain any direct reference to the constitutionality of any law, either state or federal, nor has the case been tried or at any time

argued on any such premise. The only reference in the pleadings to any specific statute as such is the allegation of paragraph 8 that the Congress has delegated to the Interstate Commerce Commission power to regulate interstate commerce. It would seem implicit in the pleadings that the authority and existence of the Public Service Commission is unchallenged, within its appropriate sphere of action.

In essence the controversy centers on whether or not the particular transportation of films between Utah points is a movement in interstate commerce and subject to the sole regulation of the interstate commerce commission, or in intrastate commerce and subject to the exclusive regulation of the Public Service Commission. The Utah commission in effect asserts that since the transportation is in intrastate commerce it will prevent the respondent from conducting the same unless and until he is authorized to do so by appropriate administrative order of the Commission. The prevention itself will presumably occur also by proper commission order.

The problem is one of jurisdiction, and must involve a substantial claim as to the invalidity of the statute. *Stratton v. St. Louis Southwestern R. Co.*, 282 U.S. 10, 16.

Mr. Justice Frankfurter summarized the purposes and history of legislation providing for the three judge district court in cases where an injunction is sought for the enforcement of an order made by an administrative board or commission acting under State statutes in *Phillips v. United States*, 312 U.S. 246, 248. In that case, the Governor of Oklahoma was attempting to press claims against the Grand River Dam Authority, a federal project, for flooding of roads within the dam area. He declared martial law, and secured an ex parte order in a state court re-

straining further work on the dam. In holding that the controversy did not require a district court of three judges, the opinion stated, page 248:

> "By § 266, which is set forth in the margin, Congress provided an exceptional procedure for a well-understood type of controversy. The legislation was designed to secure the public interest in "a limited class of cases of special importance." Ex parte Collins, 277 U.S. 565, 567, 72 L. ed. 990, 991, 48 S.Ct. 585. It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket. Moore v. Fidelity & D. Co., 272 U.S. 317, 321, 71 L. ed. 273, 278, 47 S. Ct. 105. The history of § 266 (See Pogue, State Determination of State Law, 41 Harvard L. Rev. 623, and Hutcheson, A Case for Three Judges, 47 Harvard L. Rev. 795), the narrowness of its original scope,

the piecemeal explicit amendments which were made to it (see Act of March 4, 1913, 37 Stat. at L. 1013, chap. 160, and Act of February 13, 1925, 43 Stat. at L. 936, chap. 229, 28 U.S.C.A. § 345, amending § 238 of the Judicial Code), the close construction given the section in obedience to congressional policy (see, for instance, Moore v. Fidelity & D. Co., supra; Smith v. Wilson, 273 U.S. 388, 71 L. ed. 699, 47 S. Ct. 385; Ex parte Collins, 277 U.S. 565, 72 L. ed. 990, 48 S. Ct. 585, supra; Oklahoma Gas & E. Co. v. Oklahoma Packing Co., 292 U.S. 386, 78 L. ed. 1318, 54 S. Ct. 732; Ex parte Williams, 277 U.S. 267, 72 L. ed. 877, 48 S. Ct. 523; Ex parte Public Nat. Bank, 278 U.S. 101, 73 L. ed. 202, 49 S. Ct. 43; Rorick v. Everglades Drainage Dist., 307 U.S. 208, 83 L. ed. 1242, 59 S. Ct. 808; Ex parte Bransford, 310 U.S. 354, 84 L. ed. 1249, 60 S. Ct. 947), combine to reveal § 266 not as a measure of broad social policy to be constructed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."

The opinion also states, page 252:

"The claim proves too much. Probably most of the actions of governors trace back to the common provision charging them with taking care that the laws be faithfully executed. Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of § 266."

Again, in E. Parte Bransford, 310 U.S. 354, involving

a petition by the Valley National Bank of Arizona in a Federal District Court for an injunction restraining collection of Arizona state taxes by a county, the court held the suit had been properly presented to a single district judge. The opinion states, page 358:

> "The allegations that the assessments should be enjoined because violative of the statute exempting preferred stock owned by the Reconstruction Finance Corporation and Rev. Stat. sec. 5219 depend upon no constitutional provision within the meaning of Judicial Code, sec. 266. If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act.
>
> "The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment. This was decided as to sec. 266 in Ex parte Buder, and before that a similar result had been reached in Lemke v. Farmers Grain Co. in regard to a provision of the Judicial Code granting direct appeal to this Court in cases where the sole issue was the unconstitutionality of a state statute."

Also, at page 361:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked

as unconstitutional. The latter petition does not require a three judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction."

* * *

"Even where the statute is attacked as unconstitutional, § 266 is inapplicable unless the action complained of is directly attributable to the statute. There is no indication that Congress sought by § 266 to have every attack on the constitutionality of a state statute determined by a three-judge court. It sought such a bench only to avoid precipitate determinations on constitutionality on motions for interlocutory injunctions."

While the facts of *Ex parte Bransford and Phillips v. United States,* supra, may be distinguished from those of the instant case, particularly since the interstate commerce clause is not there involved, the reasoning and logic of these cases is persuasive that this case was properly presented to a single District Judge, without convening the three-judge court. There would seem to be no problem incident to the constitutionality of any of the state statutes relative to the creation and powers of the Public Service Commission of Utah. The concern is with an administrative order which it is claimed erroneously views film transportation as intrastate in character. There is nothing to suggest that upon a judicial determination that such commerce is in reality in interstate commerce, the Public Service Commission would persist in its efforts

to prevent such transportation. The facts would seem to place this case within the meaning of the opinion in *Ex parte Bransford,* supra, as a petition seeking an injunction on the ground of the unconstitutionality of the result obtained by administrative action based upon a statute which is not itself attacked.

It is felt that these relatively recent cases are controlling on this aspect of the question and particularly applicable to this case. We are, however, aware that there are other decisions bearing on the question which, it could be argued, are at variance in some respects with this conclusion. *Ex parte Northern P. R. Co.,* 280 U.S. 142, involving a railroad petition to prevent enforcement of a rate order of the Montana board of railroad commissioners; *Query v. United States,* 316 U. S. 486, wherein the United States sought to enjoin imposition by the South Carolina Tax Commission of a license tax on a United States Army Post Exchange; *May v. Lakeland Highlands Can. Co.,* 309 U. S. 310, wherein citrus fruit dealers sought an injunction against the Florida Commissioner of Agriculture to prevent cancellation of their licenses as such dealers and the enforcement of regulations under state statute providing for establishment of minimum prices to be paid producers.

The foregoing cases are based upon sec. 266 of the Judicial Code, 28 U. S. C., 1940 ed. sec. 380. The only change of concern in sec. 2281, June 25, 1948, is to require a three-judge court in cases where an interlocutory injunction is not sought.

Phillips v. United States, 321 U. S. 246, indicated the view of this court that the legislation relative to the three-judge court, supra, should be construed as a technical enactment in the strict sense of the term. The opinion further pointed out the desire of Congress to protect state legis-

lation in the field of economic enterprise and at the same time properly protect the administrative requirements of the modern federal judicial system. There can be no doubt that the three-judge courts impose a marked strain upon the federal judiciary from the standpoint of judicial administration. Inasmuch as this Court in the order allowing certiorari has directed a consideration of jurisdiction, we feel compelled to note an ancillary, though not strictly jurisdictional, holding in the recent case of *Alabama Pub. Ser. Com. v. Southern R. Co.*, 341 U. S. 341. This case was decided on May 21, 1951, subsequent to the decision of the District court herein on March 7, 1951 (R. 21). The facts are analagous. In this case, the Southern Railway Company brought an action in the Federal District Court to enjoin members of the Alabama Public Service Commission and the Attorney General of Alabama from enforcing Alabama laws prohibiting discontinuance of certain train passenger service. The railroad had applied to the Commission for permission to discontinue certain trains, and after hearing, the Commission denied the application, Notwithstanding the right of the railroad to pursue its right of appeal to the state courts, it filed complaint for injunctive relief in the United States District Court. A three-judge court held the Commission order void, and permanently enjoined the Commission from enforcing either the Commission order or penalty provisions of the Alabama Code. The court held that there was no showing that the Alabama Procedure for review of Commission orders was inadequate to preserve federal questions for ultimate review in the Supreme Court, and that intervention of the federal court was not necessary for the protection of federal rights. The District Court judgment was reversed.

The opinion states, pages 347, 348:

"We take note, however of the fact that a fed-

eral court has been asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operations of trains Nos. 7 and 8 with the public need * * * for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and other Alabama communities directly affected.

"Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, tit. 48 § 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, id. § 82, and its decision may be appealed to the Alabama Supreme Court. Id. § 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, 'supervisory in characted.'"

Also at page 349, 350:

"Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders.

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of federal court is not necessary for the protection of federal rights.

Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts."

At page 351:

"As this Court held in Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 297, 298, 87 L. ed. 1407, 1410, 1411, 63 S. Ct. 1070 (1943):

'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts . . . . On the contrary, it is but a recognition . . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer . . . .

'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

See also *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496.

The Utah statutes, relative to the Public Service Commission are similar to those of Alabama. Section 76-6-15, Utah Code Annotated 1943, provides for a rehearing before the Commission of its orders, and requires the petition to state the grounds on which applicant considers any order or decision unlawful. Section 76-6-16, Utah Code Annotated 1943, provides for review of the commission decision before the Supreme Court of Utah as a matter of right in any case after the petition for rehearing has been decided, and particularly provides that the review by the Supreme Court of Utah shall include "a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of Utah." These statutes are set forth in full in the appendix of this brief. The Utah Supreme Court has held that the review is concerned with a determination of whether the Commission acted within the scope of its authority, whether the order has any substantial foundation in the evidence, and whether any substantial right has been infringed by such order. *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298, 299.

It is apparent that the respondent had more than adequate procedures available in the Utah Courts to secure a determination of the question involved, on the merits, in this appeal. This litigation arose from a dispute between respondent and the Public Service Commission of Utah. The respondent had been transporting film intrastate within Utah for several years under certificates of authority granted by the Utah Commission. When the Commission refused authority for additional routes, after hearings, the respondent appealed this order to the Supreme Court of Utah which held that public convenience and necessity did not require the issuance of such certificates of authority.

Wycoff v. Public Service Commission, 227 P. 2d 323 (1951). Respondent then took the position that Utah film transportation was in interstate commerce, and therefore not subject to the jurisdiction of the commission. It commenced operations between points wholly within Utah despite the refusal of the Utah Commission to grant authority to do so. Thereupon, the Utah Commission brought an injunction action in the State Court to enjoin respondent's operations. Immediately thereafter, respondent instituted the present action for injunctive relief in the United States District Court.

Under the reasoning of *Alabama Pub. Ser. Com. v. Southern R. Co.*, supra, the federal courts should refuse to take jurisdiction of this case. Such refusal would adequately protect all rights of the respondent who would have available the Utah courts wherein any federal question would be preserved. It is clear that the intervention of the federal court is not necessary in this case to protect federal rights, and the evidence does not show any irreparable injury to respondent, which has an adequate legal remedy, as detailed above. There is no necessity of an injunction by a federal court in this case, and to leave this litigation in Utah courts would not only avoid untimely and unnecessary interference with the State of Utah in the administration of its laws, but will serve the best interests of the federal judicial system.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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Appendix

SECTION 76-6-15 UTAH CODE ANNOTATED 1943

REHEARINGS — NECESSARY BEFORE RECOURSE TO COURTS — STAY.

"After any order or decision has been made by the commission any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding specified in the application for rehearing, and the commission may grant and hold such rehearing on such matters, if in its judgment sufficient reason therefor is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made application to the commission for a rehearing before the effective date of such order or decision, or, if such order or decision becomes effective prior to twenty days after its date, before twenty days after the order or decision. Such application shall set forth specifically the grounds on which the applicant considers such decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days

before the effective date of the order as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application. If any application for a rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission, and, if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision or with any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except as herein otherwise provided, and except in such cases and upon such terms as the commission may by order direct. If, after rehearing and consideration of all the facts including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust and unwarranted or should be changed, the commission may abrogate, change or modify the same. Such order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtues of the original order or decision unless so ordered by the commission.

SECTION 76-6-16 UTAH CODE ANNOTATED 1943

CERTIORARI — FINDINGS CONCLUSIVE — EXCLUSIVE JURISDICTION OF SUPREME COURT.

"Within thirty days after the application for a rehearing is denied, or if the application is granted, within thirty days after the rendition of the decision on rehearing, the applicant or any party to the proceeding deeming himself aggrieved by such order or decision rendered upon rehearing may apply to the supreme court for a writ of certiorari for the purpose of having the lawfulness of the original order or decision, or the order or decision on rehearing, inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. Immediately after the service of the writ the commission shall cause notice of the pendency of the writ to be served upon each party to the action or proceeding in which the order or decision was rendered in the manner provided by section 76-6-9. On the return day the cause shall be heard by the supreme court, unless for good reason shown the same is continued. No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the state of Utah. The findings and conclusions of the commission on questions of fact shall

be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the code of civil procedure relating to writs of review shall so far as applicable and not in conflict with the provisions of this chapter apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases.

Service of the within and receipt of a copy thereof is here-

by admitted this ..... day of September, A.D., 1952.

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